CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 861.

EQUITABLE SURETY COMPANY

vs.

THE UNITED STATES OF AMERICA TO THE USE OF W. McCLELLAN & SON.

ON A CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 8, 1924.

(24,012)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 30, 1914.

1 In the Court of Appeals of the District of Columbia.

No. 2567.

EQUITABLE SURETY CO., Appellant,
vs.
UNITED STATES OF AMERICA to the Use of W. McMILLAN AND SON.

The Court of Appeals of the District of Columbia certifies that the record in the above entitled cause now pending in said Court upon appeal from the Supreme Court of the District of Columbia discloses the following:

The declaration of the United States to the use of W. McMillan and Son, filed February 11, 1913, against the Equitable Surety Co. alleges:

That Allen T. Howison, as principal, and the Equitable Surety Co. as surety, on July 24, 1911, executed a bond to the United States in the penal sum of $110,350.00, conditioned for the faithful performance by said Howison of a certain contract made by him with the Commissioners of the District of Columbia on said date. A copy of the bond made an exhibit shows that the contract was for the erection of a school building fronting on Eleventh Street, N. W., between Harvard and Girard Streets in the City of Washington.

The conditions of the bond are that if said Howison shall perform to the satisfaction of the said Commissioners the work to be done by him in accordance with the stipulations of said contract, and shall save harmless and indemnify the District of Columbia from any and all claims, delays, suits, charges, damages, judgments, etc., on account of any accidents to persons or property after the commencement of the work and prior to completion and acceptance and pay the same; and "will promptly make payments to all persons supplying him with labor and material in the prosecution of the work provided for in said contract," etc., the obligation shall be void; otherwise to remain in force. That hereafter said W. McMillan & Son, at the request of the Butt-Chapple Stone Co.,
2 agreed to furnish to said contractor certain stone materials to be used in the prosecution of the work provided for in said contract by the said contractor; and did furnish to said contractor materials of the kind and quality specified in his said contract to the value of $4,452.84, of which material the said contractor used in said building a quantity of the value of $3,952.84 for which he has failed to make payment. That defendant though requested so to do has refused to pay the same. The affidavit of the plaintiff in support of the declaration follows the requirements of Rule 73.

After the general issue, defendant filed a special plea denying liability on said bond because after the execution and delivery of the same, and without the knowledge or consent of defendant, the Commissioners of the District of Columbia and the said Howison, its principal, altered the contract the performance of which was guar-

anteed by said bond. That said alteration consisted in the entire changing of the building from one fronting on Eleventh Street to one fronting on Harvard Street, which alteration involved the contractor in considerable expense not contemplated in the original contract, and prejudicial to defendant. That said relocation of the building necessitated a material change in grading the ground. That prior to the change of location the contractor had graded the ground as required in the contract and expended therein the sum of $2,393.90. That by reason of the change said sum was a total loss to the contractor, and the further excavation made necessary by the change of location was done at a cost of $1,300.90.

The affidavit of defense alleged the said change in the contract without its knowledge or consent; and that the same necessitated a material change in the grading of the land which had been previously performed by the contractor, at a considerable expenditure not contemplated in the original contract, and prejudicial to the defendant. On motion under the 73rd Rule of the Supreme Court of the District of Columbia the Court entered judgment for
3 the plaintiff for the amount of the demand; and defendant has appealed therefrom.

By stipulation two other cases involving the same question here presented are to abide the result of this case.

The Act of Congress, in compliance with the requirements of which the aforesaid bond was executed, (30 Stat. 906) reads as follows:

"An Act Relative to the payment of claims for material and labor furnished for District of Columbia Buildings."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter any person or persons entering into a formal contract with the District of Columbia for the construction of any public building, or the prosecution and completion of any public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor and furnishing affidavit to the department under the direction of which said work is being or has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the District of Columbia or the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: Provided, That such action and its prosecution shall not involve the District of Columbia or the United States in any expense: Provided, That in such case the Court in which such action is brought is authorized to require proper
4 security for costs in case judgment is for the defendant."

"Approved, February 28, 1899."

The Court of Appeals further certifies that the following question of law arises upon the record; that its decision is necessary to the proper disposition of the cause; and to the end that a correct result may be reached desires the instruction of the Supreme Court of the United States upon that question, to wit:

Did the alteration of the terms of the contract by the District of Columbia and the contractor, without the knowledge or consent of the surety, have the effect to release the surety from the obligation of the bond?

SETH SHEPARD,
CHAS. H. ROBB,
JOSIAH A. VAN ORSDEL,
Chief Justice and Associate Justices of the Court of Appeals of the District of Columbia.

(Endorsed:) No. 2567. Equitable Surety Company, Appellant, vs. United States of America to the use of W. McMillan and Son, a Corporation. Certificate. Court of Appeals, District of Columbia. Filed Jan. 7, 1914. Henry W. Hodges, Clerk.

5 I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing typewritten pages numbered from 1 to 4, inclusive, contain a true copy of the certification from this Court to the Supreme Court of the United States of the question stated therein in the case of Equitable Surety Company, appellant, vs. United States of America to the Use of W. McMillan and Son, a Corporation, No. 2567, for its determination, pursuant to Section 251 of the Judicial Act approved March 3, 1911.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 7th day of January, A. D. 1914.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 24,012. District of Columbia Court of Appeals. Term No. 861. Equitable Surety Company vs. The United States of America to the use of W. McMillan & Son. (Certificate.) Filed January 8th, 1914. File No. 24,012.

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 861.

EQUITABLE SURETY COMPANY, APPELLANT,

vs.

UNITED STATES OF AMERICA TO THE USE OF W. McMILLAN & SON, A CORPORATION, APPELLEE.

MOTION TO ADVANCE AND PLACE ON SUMMARY DOCKET.

Comes now the appellee, United States of America to the use of W. McMillan & Son, and moves the court to advance and place the above-entitled cause on the summary docket for hearing, and for cause says that the question certified to this court has been indirectly decided by this court and directly decided by all the Federal and State courts before whom the proposition of law involved has come.

WHARTON E. LESTER,
DANIEL W. BAKER,
LUCAS P. LOVING,
Attorneys for Appellee.

J. J. DARLINGTON, Esq.,
Attorney for Appellant:

The aforegoing motion, with memorandum attached, will be presented to the court on Monday, February 2, 1914, at 12 o'clock m., or as soon thereafter as counsel may be heard.

WHARTON E. LESTER,
Attorney for Appellee.

Copy received this 26th day of January, 1914.

——— ———,
Attorney for Appellant.

MEMORANDUM.

If this cause were here on a writ of error, a motion would be made to affirm the judgment, or, in the alternative, to place it on the summary docket; but, being here on certificate from the Court of Appeals of the District of Columbia, a motion to affirm will not lie, as the question certified remains to be answered.

The sole question involved is whether or not a bond given under a statute and conditioned for the payment of laborers and materialmen furnishing labor and material used in a public building can be altered by the contractor and one of the statutory beneficiaries so as to destroy the rights of the other statutory beneficiaries, who have furnished labor and material under the contract secured by the bond and who are not parties to or in any way connected with the alteration.

An examination of the authorities of the Federal and State courts where the law involved in the question certified has been considered will show that all of them, without exception, answer the question in the negative, and this court, in the case of the Guaranty Company *vs.* The Press Brick

Company, 191 U. S., 423, on page 427, cites with approval some of these authorities.

See also U. S. *vs.* National Surety Co., 92 Fed. Rep., 549, where the exact question involved was decided.

The certificate herein shows that similar cases are pending in the Court of Appeals, and while the proposition of law involved has been decided in all jurisdictions in favor of the laborers and materialmen, in this jurisdiction this is the first case where their rights have been questioned in the appellate court, and it is highly important both for the laborers and materialmen involved and others to know their rights as soon as possible.

The question being a simple one, it is respectfully submitted that it can be argued within the time prescribed for argument of cases on the summary docket, and the court is earnestly asked to advance the case and place it on that docket.

WHARTON E. LESTER,
DANIEL W. BAKER,
LUCAS P. LOVING,
Attorneys for Appellee.

[23656]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 861.

EQUITABLE SURETY COMPANY, *Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA, TO THE USE OF W. McMILLAN & SON, A CORPORATION, *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This cause is before the Court upon a certificate from the Court of Appeals of the District of Columbia desiring the instruction of this Court upon a question of law arising under the following facts:

Allan T. Howison, a builder, entered into a contract with the District of Columbia for the erection of a schoolhouse building fronting on Eleventh Street, in accordance with plans and specifications referred to in and made a part

of the contract. The plaintiff in error became surety on the contractor's bond, pursuant to the Act of Congress approved February 28, 1899, which provides that contractors with the District of Columbia for the construction or repair of public buildings shall give bond, with surety, conditioned for performance of the contract, and that the contractor will make prompt payment to the persons supplying him with labor or materials in the performance of "the work provided for in such contract." The bond, in the present case, ran to the United States of America, its condition being for the completion of the building in accordance with the contract, and for prompt payment by the contractor to all persons supplying him with labor and materials in the prosecution of "the work provided for in said contract." The action was brought against the surety in the name of the United States of America, the obligee named in the bond, as plaintiff, to the use of W. McMillan & Son, a corporation, claiming to be a sub-contractor which furnished to the contractor certain stone to be used by him in the construction of the building. The surety pleaded by way of defense that, after the execution of the bond, the District of Columbia and the contractor, without the knowledge or consent of the surety, materially altered the contract the performance of which was guaranteed by the bond sued upon, which alteration consisted in the re-location of the structure to be built, changing its frontage from Eleventh Street as provided in the contract, to a frontage on Harvard Street, which alteration necessitated a material change in the grading of the land, the abandonment of the work of grading which the contractor had already performed under the contract, and the substitution therefor of new excavation and grading, at an increased cost of between three and four thousand dollars. A motion for judgment was made by the plaintiff, and granted by the trial court, under what is known as the

Seventy-third Rule of the Supreme Court of the District of Columbia, on the ground that the affidavit of defense accompanying the surety's pleas was insufficient, in that changes in the contract made by the contractor and the District, though subsequent to the guaranty and without the knowledge or consent of the surety, though increasing the cost of the work, did not release the surety from liability to sub-contractors. From the judgment so rendered the plaintiff in error appealed to the Court of Appeals, by which Court the question of law presented is certified to this Court for decision.

The Assignments of Error, filed below in accordance with the rule, were as follows:

I. The Court erred in holding that the affidavit of defense filed by the Defendant, the Equitable Surety Company, was not a sufficient affidavit of defense under the 73d Rule of the Rules of Practice of the Supreme Court of the District of Columbia.

II. The Court erred in granting the motion of the plaintiff for judgment, and in rendering judgment for the plaintiff.

POINTS AND AUTHORITIES.

The propositions urged below in support of the judgment are the following:

I. That the fact that the plaintiff in error is a corporate surety company, whose execution of the bond in suit was not gratuitous, but was entered into in consideration of a premium, constitutes a ground upon which its undertaking can be extended to create a liability notwithstanding the alteration in the contract guaranteed by it, and notwithstanding the fact that this alteration has involved actual detriment and loss.

II. That the appellant is liable to sub-contractors or material men under its bond, notwithstanding an unauthorized

alteration in the contract guaranteed, sufficient to release the appellant as between itself and the obligee in the bond.

I.

The first of these propositions, that a surety, entering into an obligation for a consideration, is not entitled to stand upon the contract which it has made, but may have its liability extended by an alteration in that contract which increases its risk, or involves actual detriment and loss, cannot, we submit, be sustained in principle, and is not maintained by any of the authorities which have been cited in support of it. These authorities will be found, upon examination, to be easily divisible into two classes, namely:

(a) Authorities which hold that, inasmuch as the bond in the case of corporate sureties is prepared by the bonding companies themselves, the rule of construction applicable to all contracts under like circumstances, namely, the rule that the language shall be construed most strongly against the party who has employed it, applies. In the case at bar it is not shown, and as we are advised it is not the fact, that the bond in suit was prepared by the plaintiff in error; nor, if it had been, is there any ambiguity in the language of the condition of the bond admitting of resort to rules of construction. The condition is for payment to all persons supplying labor or materials "in the prosecution of the work provided for in said contract," which was the erection of a school-building having its frontage on Eleventh Street.

(b) Authorities which hold that, in surety obligations of this character, *i. e.*, those which rest upon a consideration, the rule *strictissimi juris*, which relieves the surety if any change is made in his contract, whether prejudicial to him or not, does not apply, and that he is to be released, only, where the alteration is detrimental.

That a change in the contract like the one here presented, namely, a change which substituted a different site for the building to be erected, which materially increased its cost, and which was made without his consent or knowledge, necessarily releases the surety, is elementary, and need not be largely discussed. Miller vs. Stewart, 9 Wheat., 680, 702; United States vs. Boecker, 21 Wall., 652; Zimmerman vs. Judah, 17 Ind., 286, approved in United States vs. Freel, 186 U. S., 309, 318; O'Neal vs. Kelley, 65 Ark., 550; Chester vs. Leonard, 68 Conn., 495, 570; Thompson vs. Chaffee, 89 S. W. (Tex.), 285, 287; School District vs. Greene, 135 Mo. App., 421, 426.

"If this were not so, an entirely different building from that stipulated may have been erected at the surety's cost. Thus, the alleged change in the broken ashlar work, alone, occasioned an additional expense of $1,600 or more—more than the balance claimed." McConnell vs. Poor, 113 Iowa, 133, 139.

"It is manifest that this whole case turns upon whether or not Bogenshot, through his foreman, without his knowledge, was required to do a class of masonry work on this bridge more costly than his contract and the specifications referred to therein called for. If such was the case, and the sureties knew nothing of it until after the contract was completed, it is clear that it was a material change in the contract of Bogenshot, the execution of which they became bound for as sureties on his bond, and that the material change released them." Bridge Co. vs. Bogenshot, *et al.*, 48 S. W. (Tenn.) 97, 102.

That in the present case, and in the state of the record under which the judgment appealed from was rendered, the alteration in the building did materially increase its expense, and was made without the knowledge or consent of the plaintiff in error, is admitted. It is submitted that, with

respect to the contention now under consideration, the surety was thereby necessarily released, unless, assuming the fact to be that it received a premium for entering into the bond, the legal consequence follows that its liability is, for that reason, to be extended beyond that for which it contracted. The authorities cited below for this consequence were Baglin vs. Title Guaranty and Surety Co., 166 Fed., 356; Atlantic Trust Co. vs. Laurinburg, 163 Fed., 690; Guaranty Co. vs. Pressed Brick Co., 191 U. S., 416, and United States, use of Hill, vs. American Surety Co., of New York, 200 U. S., 197.

In Baglin vs. Title Guaranty & Surety Company, 166 Fed., 356, the defense was that the obligee had failed to disclose to the surety a certain fact which the surety company contended was material to the risk. After some reference to the question whether a surety corporation, acting for hire, is entitled to the same consideration as a volunteer surety, the Court declared the question in the case before it immaterial in its view, "whether the defendant is to be treated as if it were a volunteer surety, or as if it were an insurer;" that, to render the alleged omission obnoxious to the rules concerning concealment, it must appear that the undisclosed fact was a material one, which "might fairly be considered to influence the defendant in deciding whether it would accept the risk," and that the Court did not consider the alleged undisclosed fact to be of that character.

In Atlantic Trust Co. vs. Laurinburg, 163 Fed., 690, in which case, as the opinion declared, the bond was wholly prepared by the Trust Company, and made provision for "various reasonable changes under the direction of the town's engineer," the defense was certain changes, all of which the Court found to be, as an undisputed fact, in favor of the contractor, lessening the expense to him. It was in a case of this character that the Court quoted from

Guaranty Co. vs. Pressed Brick Co., 191 U. S., 416, to the effect that the rule of *strictissimi juris,* liable at all times to work injustice, ought not to be extended to contracts not within the reason of the rule, "particularly when the bond is underwritten by a corporation which has undertaken for profit to insure the obligee against a failure of performance on the part of the principal obligor," and followed with some remarks of its own in a similar line of comment. That opinions of courts are always to be read in the light of the facts upon which they are rendered, and of the point decided in the case, is familiar. Wetmore vs. Karrick, 205 U. S., 141, 155; Harriman vs. Northern Securities Co., 197 U. S., 244, 291; Pollock vs. Farmers' Loan & Trust Co., 157 U. S., 429, 574-5; Carroll vs. Lessee of Carroll, 16 How., 275, 286-7; Paolucci vs. United States, 30 App. D. C., 217, 222; Brunthaver vs. Talty, 31 App. D. C., 134; Buchanan vs. Macfarland, 31 App. D. C., 619-20.

In Graham vs. United States, 188 Fed., 651, 657, the same Court which decided the Laurinburg case, *supra,* referring to that case, said: "In such cases, before such bonding company can be released, it must show that the changes made in the contract guaranteed by it operated injuriously to affect its rights and liabilities,"—which is precisely what the plaintiff in error has done, in the case at bar.

So in United States vs. United States Fidelity & Guaranty Company, 178 Fed., 721, which, like the present case, was a suit by a sub-contractor upon the bond of a Government contractor, the Court held that, where a paid surety company has given the bond, and it defends on the ground of a change in the contract, the question is not, merely, has the contract been changed, but, if so, was the surety prejudiced by the change?

And in Young vs. American Bonding Company, 228 Pa. St., 273, 280, the Court said: "The trend of all our mod-

ern decisions, Federal and State, is to distinguish between individual and corporate suretyship where the latter is an undertaking for money consideration by a company chartered for the conduct of such business. In the one case the rule of *strictissimi juris* prevails, as it always has; with respect to the other, because it is essentially an insurance against risks, underwritten for a money consideration by a corporation adopting such business for its own profit, the Courts generally hold that such a company can be relieved from its obligation for suretyship only where the departure from the contract is shown to be a material variance."

Returning to consideration of the authorities cited below in support of the judgment, the question in Guaranty Co. vs. Pressed Brick Co. was whether a material man had released the surety by accepting the contractor's promissory notes at thirty and sixty days for the materials furnished by him, which acceptance the surety company claimed was an extension of time, releasing it from liability. The Court held, simply, that the surety company was not discharged, because its undertaking was that the contractor would "promptly make payment to all persons supplying labor and materials," and that payment at thirty and sixty days came within the terms of such a contract. The only expressions of the Court bearing upon the question now under consideration, are the following: "Counsel for the Brick Company argued with much persuasiveness that this rule of *strictissimi juris*, though universally accepted as applicable to the undertaking of an ordinary guarantor, who is usually moved to lend his signature by motives of friendship or expectation of reciprocity, and without pecuniary consideration, has no application to the Guaranty Companies, recently created, which undertake, upon the payment of a stipulated compensation and as a strictly business enterprise, to indem-

nify or insure the obligee in the bond against any failure of the obligor to perform his contract. It is, at least, open to doubt, however, whether any relaxation of the rule should be permitted as between the obligee and the guarantor, which may have signed the guaranty in reliance upon the rule of *strictissimi juris*, and with the understanding that it is entitled to the ordinary protection accorded to guarantors against changes in the contract or extensions of the time of payment. The Government wisely protects itself in these cases by providing in the bond that the obligation of the surety shall extend to all changes in or additions to the contract which may thereafter be made—a clause which we have held extends to such changes as might be found advantageous or necessary in the plans or specifications, *but does not extend to a change in the location of the structure to be built* [italics ours]. United States vs. Freel, 186 U. S., 309. But no provision was made in the bond in that case with respect to all persons supplying labor or material to the contractor in the prosecution of his work. We do not, however, deem it necessary to express an opinion upon this subject, as we prefer to rest our decision upon the peculiar character of the covenant upon which this action is brought,"—namely, a covenant that the contractor would "promptly make payment to all persons supplying labor and materials," within which provision the Court, as stated, found a credit of thirty or sixty days fairly came. So far from being an authority for the proposition that the rule of *strictissimi juris*, even, does not apply to corporate sureties, the Court held it to be "at least open to doubt" whether any relaxation of the rule should be permitted, even as against corporate sureties; on the ground that it may have signed the guaranty in reliance upon that rule, with the understanding that it is entitled to the ordinary protection accorded to guarantors against changes in their contracts or extensions

in the time of payment"; and, as will be noted, it cites its former ruling in United States vs. Freel to the effect that, even where the contract provides that the surety's obligation shall extend to all changes in or additions to the contract which should thereafter be made, such a clause will not extend "to a change in the location of the structure to be built," which is the case here presented.

In United States, use of Hill, vs. American Surety Company, 200 U. S., 197, the question was whether the bond, given under the Act of August 13, 1894, protected subcontractors, or extended to the principal contractor alone. The Court held itself entitled to construe the bond in the light of the purpose and intention of the Act, but, though referring to the language of the Court in Guaranty Co. vs. Pressed Brick Co., above quoted, based its right so to construe the Act upon the principle that "the rule which permits a surety to stand upon his strict legal rights, when applicable, does not prevent a construction of the bond with a view to determining the fair scope and meaning of the contract in the light of the language used and the circumstances surrounding the parties."

Not one of these authorities, it will be seen, controverts the natural and just proposition that a corporate surety, equally with any other contracting party, whether a surety or a principal, has a right to stand upon its contract, as made by it, and that any alteration in the contract which increases its risk or otherwise affects its liability, especially where the change is to its detriment or loss, is thereby released. This Court, in Guaranty Co. vs. Pressed Brick Co., very plainly indicates the contrary view, which view, it is believed, has been maintained whenever the question has required decision.

In Bauschard Co. vs. Fidelity & Casualty Co., 21 Pa.

Super Ct., at p. 375, the Court said: "It is true in part that the position of a surety was originally surrounded by safeguards by the law, because that position was voluntarily and gratuitously assumed as an act of kindness, and that the entry into use of surety bonds has now become a business for the transaction of which corporations are created, who are compensated for their services. This new condition may detract from any sentimental considerations bearing upon their responsibilities, but it has not yet resulted in changing principles of law affecting general rights of sureties."

In United States vs. American Bonding & Trust Co., 89 Fed., 925, 929, which arose in Maryland upon a bond such as the one here involved, and in a suit brought by a subcontractor against a corporate surety, the Court said: "When the rights of sureties are involved, they are only bound by the contract which they have signed, and have a right to look to the literal and strict construction of the same, and not that such construction shall be extended, either by implication or as a consequence of what others may do, in matters of which they have no notice, and with which they are not connected."

So, in United States vs. Bayly, *et al.*, 39 App. D. C., 105, the Court of Appeals of the District of Columbia, though citing generally the case of Guaranty Co. vs. Pressed Brick Co., 191 U. S., 416, *supra*, upon the question whether the rule *strictissimi juris* is applicable to surety companies acting for compensation, declares that, where the question to be decided is one which "can be answered from the express language of the bond and contract, without the aid of technical rules of construction," the question is "neither one of liberal nor strict construction;" and that, where the surety's obligation was for performance by a contractor of a designated service for two years, the surety, though a corporation, was not liable for the period covered by a renewal of

the contract, although the contract, itself, provided for the privilege of such renewal. *A fortiori,* a guaranty of a contract to build a schoolhouse fronting on Eleventh Street, and containing no provision whatever with reference to any change in its location as contracted for, cannot bind the guarantor upon the contract subsequently altered, and therefore for all legal purposes a new contract, for the building of a schoolhouse fronting on Harvard Street; and especially is this true where the re-location materially increases the cost of construction, with a consequent and accompanying increase in the risk and liability of the guarantor.

In the very recent case of Baglin vs. Southern Surety Company, decided by the Court of Appeals of the District of Columbia on March 2, 1914 (42 Wash. Law Rep., 162, 164), the Court said: "If an insurance company may require as a condition to the validity of a policy issued by it, the giving of notice of any prior or subsequent insurance (Assurance Co. vs. Building Ass'n., 183 U. S., 308), so may a surety company insist upon the performance in good faith of the very condition upon which it was induced to enter into its contractual obligation."

Upon the first of the questions presented in this case, therefore, it is respectfully submitted that the alteration of the contract with respect to the location of the building made it a new and different contract from that which the appellant guaranteed, and one, accordingly, to which the appellant, notwithstanding the fact that it is a corporate surety, or the fact, if it be a fact upon this record, that it received a premium for entering into the bond, is not a party, and with respect to which, therefore, it is without liability.

II.

The foregoing considerations, under the first of the questions presented in this case, should, we submit, be logically

and necessarily conclusive of the second question, also. If the changed location of the school house created a new contract, to which the appellant was not a party, it would seem inconceivable in principle that the appellant can be liable upon it, to any one. There is, however, a line of cases in the lower Federal courts and in those of one or two of the States to the effect that bonds like that sued upon in the present case constitute in effect two bonds, one to the owner —in this case the District of Columbia—and one to the sub-contractors and material men; and that changes made by the owner and contractor, sufficient to release the surety as to the former, may not affect the surety's liability to material men and sub-contractors.

The question has not been passed upon by the Courts of the District, nor by this Court. It is, therefore, an open one with us, upon which the authorities referred to are persuasive only in so far as they are found applicable to the facts of this case, and to be founded in justice and upon correct legal principles. Its consideration may, perhaps, be profitably preceded by a brief reference to the statutory provisions under which the bond was given.

The Act of Congress approved February 28, 1899, provides that contractors with the District of Columbia for the construction or repair of public buildings shall give bond conditioned, among other things, that "such contractor or contractors shall promptly make payment to all persons supplying him or them labor or materials in the prosecution of *the work provided for in such contract*," the Act further authorizing any such person who is not promptly paid to bring suit on the bond, in the name of the United States. 30 Stats. L., 906. The bond in question was executed pursuant to the Act, and the declaration recites as its condition, the italics being ours, "performance by the contractor of the work to be done by him *in accordance with the stipulations*

of a certain contract bearing date the 24th day of July, 1911, and now here in court produced," and that the contractor "would promptly make payments to all persons supplying him with labor and materials *in the prosecution of the work provided for in said contract.*" See Record, p. 1.

The authorities cited below in support of the motion for judgment, and upon which the judgment appealed from was rendered, are United States vs. National Surety Co., 92 Fed., 549; Dewey vs. State, 91 Ind., 173; Conn vs. State, 125 Ind., 514; United States vs. Lynch, 192 Fed., 364; Brown & Haygood Co. vs. Ligon, 92 Fed., 851; American Bonding Co. vs. Pueblo Inv. Co., 150 Fed., 17; United States vs. California Bridge & Construction Co., 152 Fed., 559; Chaffee vs. United States Fidelity & Guaranty Co., 128 Fed., 918—nearly all of which are readily distinguishable.

In United States vs. National Surety Co., 92 Fed., 549, the alteration consisted, simply, in reducing the amount of the water pipe to be laid from 3,850 lineal feet as required by the contract, to 1,866 lineal feet, and thus "lessened the amount of water pipe to be supplied." So far from being an alteration to the prejudice of the surety, the change was altogether in its favor, and its defense, therefore, was an appeal, simply, to the extreme *strictissimi juris* rule. It was under facts of this character that the Court held the question to be whether the Act made the United States the agent of the material men in such sense that its consent to a change in the contract was to be imputed to them; that the bond was provided to perform a double function, first to secure to the government the faithful performance of the contractor's engagement, and, secondly, to protect third persons from whom the contractor obtained materials and labor, and that, in this latter aspect, it was an agreement upon the

part of the obligors that third persons should be paid for whatever labor or materials they might supply to enable the principal to execute his contract with the United States, the two agreements being as distinct as if contained in separate instruments; and that, in view of these circumstances the surety was not released by subsequent changes made in the contract by the contractors and the government, "which did not alter the general character of the work contemplated by the contract or the materials necessary for its execution." This case, read in the light of its facts, under the rule referred to at p. 7, *supra*, we submit is without material weight in the determination of the question presented here. The opinion cites, specially, as the authority upon which it is founded, the case of Dewey vs. the State, 91 Ind., 173, and Conn vs. State, 125 Ind., 514.

In the first of these cases, Dewey vs. State, the provisions of the statute and the condition of the bond were, that the contractors should "promptly pay all debts incurred by them in the prosecution of said work, including labor, materials furnished and boarding the laborers thereon," the statute further giving the material men and laborers the right of action upon the bond. The contract guaranteed was one between the Commissioners of Marion County and contractors for the improvement of a county road, the defense being, not that a new contract had in effect been substituted for the old one, but, simply, that the county commissioners had omitted to retain 10 per centum of the contract price until completion of the work, as provided in the contract.

This case, therefore, it is submitted, has little if any relevancy to a case under the facts presented here. The thing which the contractors, with the labor and materials furnished them for the purpose, was to do, was in no way changed or affected. The *contract* had not been altered at all.

In Conn vs. the State, 125 Ind., 514, changes were made in the contract by the county commissioners which materially increased the cost of construction. This case was decided upon the authority of Dewey vs. the State, and on the further ground that the statute was passed to prevent injustice and loss to laborers and material men, and that to permit the contractor and County Commissioners by any act of theirs, "without the consent of the laborers or material men, to destroy their security, would be the grossest injustice. To permit them to do so would be to permit them to set at naught the plain intention of the Legislature as expressed in the statute."

With respect to the first ground of this decision, namely, the authority of Dewey vs. the State, it has already been noted that the decision in that case was rendered under a state of facts which did not change the contract, or render it in any respect a different contract from that which the surety guaranteed; and, therefore, that the authority is not even persuasive with respect to a case arising under facts so different from those with which it dealt. The latter ground, that the statute was passed to protect laborers and material men, and that to permit the owner and the contractor, by acts not consented to by these classes of persons, to destroy their security, would be a gross injustice, defeating the intent of the statute, goes too far. It loses sight of the justice to which the bondsman is entitled, and of the fact that the material men and laborers whom it was the intention of the statute to protect, were those who furnished labor and materials for the work provided for *in the contract,* to which, and to which alone, the surety's obligation extended. Under the doctrine thus laid down, if a schoolhouse to be erected on Eleventh Street, in Columbia Heights, had been contracted for and guaranteed by the appellant, and the District of Columbia and the contractor, without

the appellant's knowledge or consent, had concluded to erect one in Congress Heights or in Georgetown instead, however greatly increased the cost, risk and liability might be, the appellant would be liable to the sub-contractors and material men erecting the substituted structure. Upon what principle may the immediately contracting parties so materially change their contract, and in doing so be held not to have represented the sub-contractors and material men so as to affect their rights, and yet to have represented the surety, and to have bound him, although he was equally in every legal aspect a stranger to them with respect to the altered undertaking, equally ignorant of their conduct, and equally non-assenting thereto?

Even if the argument *ab inconvenienti* could authorize the imposition upon a surety of a contract which he has not made, we submit that it is far more practicable for the sub-contractors and material men to ascertain, and to see to it, that no radical change in the construction of the building contracted for is made without the surety's consent, than for the surety to do so. They may refuse to proceed with the work, after a re-location of the building, unless the surety consents; while the latter, having already executed and delivered the bond, is powerless in the premises even if the change should be discovered by him.

"It is also claimed that the sureties had constructive notice from the public records, including those of the Board of Water Commissioners, of all or most of the various departures from the construction contract. Such is not the law. A surety is not bound to be on the watch for variations which may be made in the obligations of his principal. But even had actual notice of whatever was done been promptly given to the sureties on this bond, it would have been unavailing to enlarge their liability. That could result only from knowledge and acquiescence, both."

Chester vs. Leonard, *et al.*, 68 Conn., 495, 510.

As pointed out by this Court in the case of Guaranty Co. vs. Pressed Brick Co., above noted, it was held, in United States vs. Freel, 186 U. S., 309, that, even where the contract authorizes changes, alterations and modifications, a change of location in the structure is too radical an alteration to be covered by that provision, or to leave the surety still liable. In that case, the only provision as to the site of the building was that it should be "located at such place on the water line of the Navy Yard, Brooklyn, N. Y.," as the United States might designate; the change was that the building, though still within the Navy Yard at Brooklyn, should be 164 feet further inland than the site which had been laid down and staked out when the contract was entered into. "The changes called for by the new agreement had no reference to the original plans and specifications, but changed the location of the dry dock, requiring the contractor to make additional excavations and connections with the water, at an increased expense, and gave an increased time of performance." The Court cites with evident approval Zimmerman vs. Judah, 17 Ind., 286, holding that a supplemental agreement to put an additional story upon the house released the surety for the contractor under the original contract.

United States vs. Lynch, 192 Fed., 364, 368, was the case of an extension by the subcontractor of the time for payment, not in excess of a reasonable, usual and customary credit, and by reason of which the surety had not been led to change its position, or omit any action; the case thus falling within the doctrine of Guaranty Co. vs. Pressed Brick Co., and of United States, to use of Hill, vs. American Surety Company. The contract which the surety had guaranteed was not changed; one of the sub-contractors simply

extended a reasonable credit, by which the surety was not prejudiced, and which was not a violation of its rights under the obligation. The contractor was not restricted to cash purchases, or prohibited from purchasing materials at thirty or sixty days, or upon any other customary or reasonable terms.

In Brown & Haygood Co. vs. Ligon, 92 Fed., 851, the condition of the bond was apparently broader than in the case at bar, being for the payment of all persons furnishing materials therefor, all laborers, mechanics and material men, and all persons who should supply said contractor with provisions or goods of any kind. The requirement of our statute, and of the bond in suit, is for prompt payment by the contractor or contractors to all persons supplying him or them with labor and materials in the prosecution of the "work provided for in such contract." Were labor and materials furnished for the construction of a schoolhouse fronting on Harvard Street, labor and materials furnished in the prosecution of the work provided for in a contract for the erection of a schoolhouse fronting on Eleventh Street?

In this case of Brown & Haygood Co. vs. Ligon, the Court rested its decision, practically without discussion, upon United States vs. National Surety Co., 92 Fed., 549, above considered. The bond required by the statute had been given by the contractor, with A, B, C, D, and E as sureties; the defendant's obligation, which was the one sued on, was executed later, and was conditioned merely to hold A, B, C, D, and E, the sureties, harmless, under their undertaking. Later, the contract was materially changed by the contractor and the owner, with the consent of A, B, C, D, and E, the sureties, but without the consent or knowledge of the indemnitor. That case held that, under the doctrine of subrogation, the material men might hold the indemnitor to

payment of their claims, notwithstanding the increased liability, created with the consent of the sureties indemnified, and although the change was without the consent or knowledge of the indemnitor. With the utmost respect and deference to the Court which rendered it, this particular decision, we submit, lacks persuasiveness.

American Bonding Co. vs. Pueblo Inv. Co., 150 Fed., 17, was not the case of a bond under the Act of Congress or any similar statute, nor one connected in any way with a building contract, nor with laborers or material men, nor, in the opinion of counsel, in any other way affording any anology, however remote, to the case under consideration. The bond was to secure the payment of rent by a tenant, and the question was whether the landlord's acceptance of a surrender of the lease prior to its expiration by lapse of time, released the surety as to defaults existing at the time of the surrender.

In United States vs. California Bridge & Construction Co., 152 Fed., 560, the defense was that, after the giving of the bond, the site of the building was changed by the Government. The Court, in the first place, found that the contract fixed, only, "the United States Navy Yard, Mare Island, California," as the site, within which yard the building was erected; but that, independently of that question, the agreement for payment of the material men and laborers was as distinct as if contained in a separate instrument, and was not affected by the change of site, if there was such change. This decision, in its latter holding, is in point; but we submit is untenable in reason, or upon legal principles. If the site was not changed, the surety was liable equally to the Government on the one hand, and to sub-contractors and material men on the other. If, on the contrary, the site was changed, so that the contract became an agreement to erect a building in a different place

from that covered by the surety's obligation, then the Court's holding is that, although manifestly a different contract from that into which the surety had entered, he was nevertheless liable to the material men and contractors;—if the contract had called for the erection of a building in the Mare Island Navy Yard, the Government and contractor might have changed it to the Brooklyn Navy Yard, and the surety, under the alleged separate and distinct constructive agreement with the material men and laborers, would be liable for any sums due them in the erection of the building in the Navy Yard at Brooklyn, though he had entered into no obligation whatever in respect to a building there, or within three thousand miles of Brooklyn. We submit, on the contrary, that, even though regarded as a distinct obligation between the surety and material men, it is an obligation for prompt payment of the work provided for in the contract which the surety guaranteed—in the case cited, a building in the Mare Island Navy Yard—in the case at bar a schoolhouse fronting on Eleventh Street; and, to make out a right of recovery against the surety, the sub-contractors and material men must establish claims for labor or materials furnished "in the prosecution of the work provided for in such contract.

It is further to be noted, though we submit it is unnecessary to show further that the conclusion arrived at is untenable in principle, that, in United States vs. California Bridge & Construction Co., there was no claim that the change increased the cost, or the risk or liability.

In Chaffee vs. United States Fidelity & Guaranty Co., 128 Fed., 918, the remaining authority relied upon, the defense was, not that there was a change in the thing contracted to be done, but that the State had paid, before it was due, 15 per centum of the contract price, which defense the Court, without discussion, held overruled by United States

vs. National Surety Company, 92 Fed., 549, which has been above noted.

It is apparent, therefore, that, of the eight cases cited in support of the proposition now under consideration, and upon which the correctness of the judgment below depends, American Bonding Co. vs. Pueblo Inv. Co., 150 Fed., 17, is wholly irrelevant and without application; Dewey vs. State, 91 Ind., 173, United States vs. Lynch, 192 Fed., 364, and Chaffee vs. Fidelity & Guaranty Co., 128 Fed., 918, are cases in which there was no change in or in respect to the building, with which, alone, the contractors and material men were concerned, the attempted defense being, simply that the owner had made payments to the contractor before they were due, or the like, while in United States vs. National Surety Co., 92 Fed., 549, the change affected the work to be done only by omitting a part of the water pipe called for by the contract, thus lessening instead of increasing the surety's liability, and affording no possible equity for relieving the surety as against the sub-contractors and material men. This leaves, to afford any support to the judgment appealed from, under its facts, only Conn vs. State, 125 Ind., 514, Brown & Haygood Co. vs. Ligon, 92 Fed., 851, and United States vs. California Bridge & Construction Co., 152 Fed., 560, the untenableness of which cases, both in reason and upon legal principles, we submit is apparent to demonstration, upon the considerations in regard to them above set forth. The theory upon which they rest, openly and professedly, is that, because the legislature intended to protect sub-contractors and laborers, they are to be protected, even to the extent of holding the surety to a contract which he has not made; that, because the owner and the contractor have no authority to bind the material men and sub-contractors by changing the contract, they do have

such authority to bind the surety by such changes, without his consent or knowledge, even to the extent of re-locating the building, in a different site from that with respect to which he contracted, although his contract provides for no changes, and although this Court, in United States vs. Freel, 186 U. S., 309, has decided that, even in a contract which does authorize changes, a change of the site is too radical to be construed as falling within the stipulated authority.

It may well be that, in contracts of a four-fold aspect like that now in suit, to which the owner, the contractor, the surety and the material man, are, all, virtually parties, the *strictissimi juris* rule should not be applied to the extent, or with the result, of making subsequent changes agreed upon between the first two of the parties, and which do not injuriously affect the third, nevertheless sufficient to deprive the fourth party of the security intended to be provided for him. But this is a very different proposition from holding that the first two may agree to subsequent changes which make the work a different thing from that which the surety guaranteed, which increase its cost, and the risk both of guaranteeing performance and of becoming responsible to laborers and material men, with the effect of binding the surety to the party of the fourth part upon this altered contract, in which his mind met that of none of the other parties, to which he did not assent, and of which he did not even know. If the sub-contractors and material men have proceeded with a building, knowing of the change, it is too plain for argument that they are without right to look to the uninformed, non-assenting surety for the payment of their claims. If they furnish their labor and materials to the contractor without giving attention to the work which is actually being done, upon the supposition or belief that neither he nor the owner will change the contract without the

surety's consent, or without notice to them, the case falls within the rule that, where one of two innocent parties has, by his confidence in a third, given occasion for a fraud or a loss, that loss must fall upon him rather than upon the other equally innocent party. For such a change in the contract as to produce such result, without notice to them, the laborers and material men would doubtless have a remedy over against the offending parties; but, whether this be so or not, we submit there is no conceivable principle of law or of justice under which the surety can be held liable under a contract which he did not make, or for a risk which he did not assume.

If, as was argued below, the bond in suit, in so far as it relates to the defendant in error, should be read as if it ran to it exclusively, as a separate and distinct instrument, to which the District of Columbia was not a party, the fact must remain that its condition is only for payment for labor and materials supplied to the principal "in the prosecution of the work provided for in said contract"—the work provided for in the contract being the erection of a school building on Eleventh Street, and the work prosecuted being, not that, but the erection of a schoolhouse on Harvard Street. How is the case of the defendant in error strengthened? In United States vs. Boecker, 21 Wall., 652, the action was on a distiller's bond, with sureties, for payment of the revenue taxes, the bond by mistake describing the location of the distillery as "at the corner of Hudson Street and East Avenue," where the principal had no distillery, instead of at the corner of Hudson and Third Streets, where the distillery was in fact located. Said this Court:

> "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and

> under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has the right to stand upon the very terms of his contract, and, if he does not assent to any variation of it, and the variation is made, it is fatal. * * * The rules of the common law upon the subject are as old as the Year Books. These rules were doubtless borrowed from the earlier Roman jurisprudence, known as the Civil Law. They obtain throughout the States of the Union. The adjudications everywhere are in substantial harmony."

If such is the law as to a mere mistake in a description of the location of a business, or of a building, which in no way affects the liability under the bond, what is to be said of an actual change in the location, made after the bond was given, and which *does* affect the liability, by increasing it?

Even if, as was further urged below, it ought to be assumed, in rigid enforcement of the 73rd Rule, and without allegation or proof, that the material men supplied their materials to the erection of a large and costly building without knowledge or cause to suspect that the District of Columbia and the principal contractor had changed the site, and in reliance upon the assumption that they would not do so without notice to them, the principle applies, as noted above, that, where one of two innocent parties must suffer through misplaced confidence, it must be the party who reposed that confidence. Nor was the reply, suggested on behalf of the defendant in error, that the surety should be required to pay the material men and resort to the District for redress, sustainable. The entering by the surety into the obligation in suit constituted no contract, express or implied, enforceable by it, that the schoolhouse would be built at all; still less that the District authorities, in the exercise of their discretion and of their duty to the public,

should be precluded from abandoning the contract for its erection upon the site described in the bond and make a new contract for its erection elsewhere, if found more desirable or expedient. Required by the statute to exact, in all cases, a bond for the protection of the material men, it was the duty of the District of Columbia, if it made such a new contract, to require a bond applicable to the structure provided for by it, and it would seem to have been a violation of its duty to the material men not to provide such a bond, and to permit them to furnish materials without notice of the change—that is, if they can be presumed capable of furnishing the materials for a large and costly building of this character without, themselves, obtaining notice of its changed location, in the exercise of reasonable care and diligence upon their part.

Henricus vs. Englert, *et al.*, 137 N. Y., 484, 494, cited for defendant in error below, differs in its facts from the case at bar in a particular so important as to render it without relevance or materiality. The court did not hold that the sureties were liable under the modified contract, but that the changes, made between the owner and the sub-contractor for the carpenter work, without the consent of the principal contractor, to whom the defendants had guaranteed that the sub-contractor would perform his sub-contract in a workmanlike manner, left the contract of guaranty unimpaired, and enforceable against the sureties. Had the case held that a change in the location of the building left the original contract unimpaired, it would be subject to the infirmity of being in opposition to United States vs. Freel, 186 U. S., 304, and United States vs. Boecker, 21 Wall., 652, which establish the contrary doctrine, certainly in the Federal courts.

So in Steffes vs. Lemke, 40 Minn., 29, an omitted part of the opinion as quoted below reads as follows: "Whether

and how far the terms of the original contract existing when the bonds were executed may be changed by them"—*i. e.*, by the owner and the contractor—"the building to be constructed continuing substantially the one contracted for, without affecting the claims of those doing work and furnishing material, it is unnecessary to decide. Certainly a mere extension of the time to complete the contract would have no such effect"—this being the defense in that case. Here the defense is that the building to be constructed did *not* continue substantially the one originally contracted for, but that the contract was made a different one, into which the surety did not enter, and one which involved a larger cost and an increased liability.

Abbott vs. Morissette, 46 Minn., 10, was cited below as a case in which an agreement between the obligee and one of the principals to release the other principal was held not to discharge the surety's liability. This, if true, would present an entirely different proposition from the one under consideration here. An examination of the case, however, will show the case to have been cited inadvertently. The contractor for the work was a partnership, which was subsequently dissolved, one of the partners assigning to the other the interest of the former in the contract, after which the latter proceeded with and completed performance of it. So far from the obligee's releasing one of the principals, there is nothing in the report of the case to show that he was even aware of the partnership dissolution, or of the assignment.

The contention below, that material men could not prevent a change, that they "probably" would not know of it, and that if the defense pleaded should be held sufficient, they would be without the recourse which the Act of Congress intended them to have, however great may be the hardship based upon such supposed probability, cannot extend the surety's liability beyond that stipulated in the con-

tract which he has made, and upon which he has the right to stand.

Respectfully submitted,

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J. J. DARLINGTON,
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FILED
JAN 31 1914
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 861.

EQUITABLE SURETY COMPANY, APPELLANT,

vs.

UNITED STATES OF AMERICA TO THE USE OF W. McMILLAN & SON, A CORPORATION, APPELLEE.

MEMORANDUM IN REPLY TO MOTION TO ADVANCE AND PLACE ON SUMMARY DOCKET.

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MEMORANDUM IN REPLY TO MOTION TO ADVANCE AND PLACE ON SUMMARY DOCKET.

The facts in the above cause, briefly stated, are as follows:

The appellant was surety for the performance by a contractor of his contract to erect a public school building in the city of Washington fronting on Eleventh Street, and for the payment by him of all persons supplying labor and material "in the prosecution of the work provided for in said contract." After the work had been begun and several thousand dollars expended in its prosecution, the District of Columbia and the contractor, without the knowledge or consent of the surety, changed the building from one which should front on Eleventh Street, as provided for in the contract guaranteed by the appellant, to one fronting on Harvard Street, which alteration further materially increased the expenditure necessary to performance. The question presented is

identical in its facts with that of United States *vs.* Freel, 186 U. S., 309, except that in that case the question arose between the owner and the surety, while it arises here between the materialmen and the surety. Neither Guaranty Co. *vs.* Pressed Brick Co., 191 U. S., 423, nor United States *vs.* National Surety Co., 92 Fed. Rep., 549, cited in the memorandum in support of the motion to advance, decides the question presented, or, it is conceived, bears upon it, directly or indirectly. The question is one of much importance to the appellant, the argument of which, in the opinion of itself and that of its counsel, should not be restricted to the time for argument allowed causes placed on the summary docket; nor, as it is advised, does either the motion or the memorandum in support of it show any ground for such action.

Respectfully submitted.

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Supreme Court, U. S.
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BRIEF ON BEHALF OF UNITED STATES OF AMERICA TO THE USE OF W. McMILLAN & SON.

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vs.

THE UNITED STATES OF AMERICA TO THE USE OF W. McMILLAN & SON.

BRIEF ON BEHALF OF UNITED STATES OF AMERICA TO THE USE OF W. McMILLAN & SON.

The question certified to this court by the Court of Appeals of the District of Columbia is whether or not the alteration of the terms of a formal contract entered into with the District of Columbia for the construction of a public building, without the knowledge or consent of the contractor's surety, releases such surety from that part of the obligation of its bond given to the United States of America for the benefit of material-men and laborers in accordance with the act of Congress approved February 28, 1899, and quoted on page 2 of the record.

The object of this act, as set forth in its title, is to secure "the payment of claims for material and labor furnished for

District of Columbia buildings." Prior to its passage bond was usually required of persons contracting with the District of Columbia, which bond protected the municipality only. Laborers and material-men had no security and could assert no lien on building or land belonging to the Government. A remedy being needed, this act was passed, which provided that *"any person or persons entering into a formal contract with the District of Columbia for the construction of any public building * * * shall be required * * * to execute the usual penal bond * * * with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials in the prosecution of the work provided for in such contract."* (Italics ours.)

An act of Congress was passed August 13, 1894, entitled "An act for the protection of persons furnishing materials and labor for the construction of public works," which is identical in language with the first-mentioned act, except that the act of 1894 provided security for those who furnished labor or material used in public buildings erected by the United States, whereas the act of 1899 was designed to afford security for those who furnished labor or materials used in buildings erected for the District of Columbia. The act of 1894 has been construed by this court on several occasions, whereas the act of 1899 has not been considered by this court in the aspect now presented.

Both of these acts are remedial. The object of each is to secure payment to persons supplying labor or materials used in buildings erected respectively for the United States and for the District of Columbia. They are designed to afford security similar to that usually given by mechanic's-lien laws.

In Mining Co. *vs.* Cullens, 104 U. S., 176, it was said that as a general rule statutes providing for liens in favor of

those furnishing labor and materials used in the construction of buildings have been liberally construed in aid of the suppression of the mischief and the advancement of the remedy.

In United States to the use of Hill *vs.* American Surety Company, 200 U. S., 199, the act of 1894 was considered, and it was held that labor and materials used in the prosecution of a public work, whether furnished under the contract directly to the contractor or to a subcontractor, must be deemed within the obligation of the surety *in view of the manifest purpose of that statute to protect those whose labor or material has contributed to the prosecution of the work.* The court, referring to the amendment to said act, said:

> "It shows the consistent purpose of Congress to protect those who furnish labor or material in the prosecution of public work. * * * As against the United States no lien can be provided upon its public buildings or grounds, and it was the purpose of this act to substitute the obligation of a bond for the security which might otherwise be obtained by attaching a lien to the property of an individual. The purpose of the law is, as its title declares, 'For the protection of persons furnishing material and labor for the construction of public works' * * * but we must not overlook, in construing this obligation, the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for, and to provide a security to that end. * * * The obligation is 'to make full payments to all persons supplying it with labor or materials in the prosecution of the work provided for in said contract.' This language read in the light of the statute looks to the protection of those who supply the labor or materials provided for in the contract."

In Fidelity and Deposit Co. *vs.* Smoot, 20 App. D. C., 376, affirmed by this court, it was held that the bond created a special lien in favor of persons furnishing labor and ma-

terials upon the work and afforded a substitute for the building or work itself, which in private contracts is the thing charged.

Such being the object of these statutes, the question is whether or not the United States officials, in the one case, or the District of Columbia officials, in the other, can by a modification of the contract release the surety the law requires shall be given.

The act of 1899 requires the Commissioners of the District of Columbia to obtain the bond, and it is submitted that when they have done so their agency, so far as the bond is intended as security for the material-men and laborers, is at an end and that they can do naught to affect such security.

It will be noticed that the bond required by this statute is of a dual nature given for the benefit of two classes of statutory beneficiaries. It provides, *first,* for security to the District of Columbia for the faithful performance of the contract and, *second,* for the payment for labor and materials used in completing the contract. These two obligations are separate and distinct. One has naught to do with the other, and, although the Commissioners of the District of Columbia act as agents in obtaining the bond, they have no further authority over it so far as the second obligation is concerned. The first obligation being for the protection of the District of Columbia, doubtless its Commissioners could waive the security given it and release the surety from that part of the bond given for its benefit, but no power is given them to modify or annul that part of the bond given for the benefit of others, and it is submitted that they could not do so by formal release, by changing the terms of the contract, or in any other manner. If they cannot destroy the rights of material-men by formal act or deed, they cannot do so by accident or by a change in the plans of the building. If they cannot expressly annul the statute, they

cannot impliedly do so. Having performed the duty imposed upon them to receive the bond, their duty and power in that respect is at an end. They are not parties to the bond, but are merely one of the classes of statutory beneficiaries protected thereby. If the Commissioners have power by formal act, by modification of the contract or otherwise, to release the surety required for the benefit of laborers and material-men, then Congress has established a law for the benefit of a class of people, while the Commissioners of the District of Columbia may at pleasure, or by accident, annul, thereby depriving that class of what Congress intended they should have and render the act of Congress abortive. Such a bond would be useless, and the act would not afford the remedy it was intended to provide. The owner of land contracting for the erection of a building cannot prevent a mechanic's lien from attaching by changing his agreement with the contractor, nor can the Commissioners of the District of Columbia prevent the lien afforded by Congress from attaching to the bond substituted for land by changing its contract. If an executor gives bond for the benefit of the creditors of an estate, one creditor cannot affect another's rights under the bond by waiving his own right.

A different question would be presented had the Commissioners modified the terms of the contract without the consent of the surety and then attempted to hold the surety liable on the obligation to them. Representing the District, they could doubtless waive a benefit to it and release the surety.

If the Commissioners could, by modification of the contract, release the surety required for the benefit of laborers and material-men, they could do so without the consent or knowledge of the persons to be benefited. These beneficiaries would have no power to prevent the Commissioners changing the plans of the building if they knew such act was contemplated, and even though they had furnished a large

part or all of the material they had contracted to furnish or done all the work they contracted to do. In the case at bar it does not appear whether the modification was made before or after the material was furnished by McMillan & Son.

All contracts with the District of Columbia are founded on bids upon specifications. If a material-man submitted a bid based upon specifications for 100,000 brick and after the execution of the contract and bond furnished the brick, and the frontage of the building should then be changed without his knowledge from Harvard to Eleventh street, requiring neither more nor less brick, it cannot be successfully contended that the surety is thereby released from its obligation to the bidder, who knew nothing of the contemplated change or, if he knew of it, had no power to prevent it. Had he furnished but 90,000 brick before the change was made, the principle involved would be the same.

In the case at bar it is conceded that the materials were furnished *under the contract for which the bond was given*, not under a substituted or other contract. A still different question would be presented had the Commissioners made additions to the building to be constructed, and persons who furnished labor or material for such additions were attempting to assert claims against the surety who had not consented to the additions—a question not now involved. In the instant case McMillan & Son furnished material under the original contract, which material was used in the building contracted for, and, we submit, any change of grade or frontage cannot affect their rights.

The fact that the change in the contract is trifling does not affect the legal proposition, but attention is called to the fact that the contract was double the amount of the bond, or $220,617, and the change of frontage of the building cost but $1,300.90 in addition to the original contract price. If

such a slight change by the parties to the contract could affect the liability of the surety to the material-men, the change of a door or a window blind adding a cost of but one dollar would accomplish the same result.

United States *vs.* National Surety Co., 92 Fed., 549, is one of the leading cases on this subject, and probably the earliest reported case construing the act of August 13, 1894. This case was decided by the Circuit Court of Appeals in February, 1899, and has been considered authority for all subsequent cases. Suit was brought by the Anniston Pipe & Foundry Company in the name of the United States to recover the value of certain pipe it had supplied to the contractor, one Prosser, subsequent to the execution of the bond given in accordance with the statute. The trial court found that subsequent to the execution of the bond and the contract it was given to secure, the Government had entered into a further agreement with the contractor, modifying the terms of the original contract, requiring him to lay 1,866 lineal feet instead of 3,850 feet as specified in the contract, and that the change was made without the knowledge or consent of the surety, and held that in view of the change in plans lessening the amount of pipe necessary to be supplied the plaintiff could not recover. The cause was removed to the Circuit Court of Appeals, where Judge Thayer, after stating the case, said:

> "It is a familiar rule of law that a contract of a surety must be strictly construed and that it cannot be enlarged by construction, and that when a bond with sureties has been given to secure the performance of a contract, and the principal in the bond and the person for whose benefit it was given make a material change in the contract without the consent of the surety, the latter is thereby discharged. For present purposes it may be conceded that the finding of the lower court in the case at bar *discloses such a modification of the original contract between Prosser and the United States as would fall within the rule last*

stated and release the defendant company from its liability, if the United States was suing for its own benefit for a breach of some provision of the contract, the due performance for which the bond was intended to secure. Such, however, is not the case. The suit is not brought by the United States to recover any damage which it has sustained, neither is it brought to enforce any provision of the contract which was entered into between the United States and the principal in the bond. On the contrary, the action is one to enforce a stipulation found in the bond and only in the bond, which was intended *solely* for the protection of laborers and material-men who might furnish labor and material while the contract was being executed by Prosser. * * *

"The real plaintiff is the corporation for whose use the suit was brought, and it sues to enforce an obligation which Congress required to be inserted in the bond for its protection and for the protection of others who might furnish labor or material while the work was in progress.

"The real question to be considered, therefore, is whether the act of Congress under which the bond in suit was taken constituted the United States the agent or representative of the persons who supplied labor and materials after the contract and bond were executed, in such a sense that its action in consenting to a modification of the contract with Prosser must be imputed to the laborers and material-men, and held to deprive them, as well as the Government, of all recourse against the surety.

"The act of Congress of August 13, 1894, does not authorize the United States to bring suits of its own motion against the obligors in such bonds as are therein provided for, to recover what is due to laborers and material-men. It is not empowered to act in their behalf in that respect, but such actions can only be brought at the instance of persons who furnish labor and materials, who are authorized, without previous leave being obtained from any executive department, to sue in the name of the United States, and control the litigation precisely as they might control it if the suits were brought in their own name. It

is also noticeable that in its title the act professes to be one for the benefit 'of persons furnishing materials and labor,' and that in the body of the act the form of the condition to be inserted in the bond for the benefit of the United States is not in terms prescribed, the only provision in that regard being that the bond shall be 'the usual penal bond'; meaning, evidently, such an obligation for the Government's own protection as it had long been in the habit of exacting from those with whom contracts were made for the doing of public work. On the other hand, the condition for the benefit of persons who might furnish materials or labor is carefully prescribed. Obviously, therefore, Congress intended to afford full protection to all persons who supplied materials or labor in the construction of public buildings, or other public works, inasmuch as such persons could claim no lien thereon, whatever the local law might be, for the labor and materials so supplied. There was no occasion for legislation on the subject to which the act relates, except for the protection of those who might furnish materials or labor to persons having contracts with the Government. The bond which is provided for by the act was intended to perform a double function—in the first place, to secure to the Government, as before, the faithful performance of all obligations which a contractor might assume towards it; and, in the second place, to protect third persons from whom the contractor obtained materials or labor. Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains, the one for the benefit of the Government, and the one for the benefit of third persons, are as distinct as if they were contained in separate instruments, the Government's name being used as obligee in the latter agreement merely as a matter of convenience.

"In view of these considerations, we are of opinion that the sureties in a bond, executed under the act now in question, cannot claim exemption from lia-

bility to persons who have supplied labor or material to their principal to enable him to execute his contract with the United States, simply because the Government and the contractor, without the surety's knowledge, have made some changes in the contract, subsequent to the execution of the bond given to secure its performance, which do not alter the general character of the work contemplated by the contract or the general character of the materials which are necessary for its execution. When the Government has executed the contract and taken and approved the bond, it ceases to be the agent of third parties whom the contractor employs in the execution of the work or from whom he obtains materials, and the rights of such persons under the bond are unaffected by subsequent transactions between the Government and the contractor. If such were not the case, it would be possible for the contractor and some officer of the United States, by making some change in the contract or specifications, to deprive laborers and material-men of all recourse against the sureties in the bond after they had supplied materials and labor of great value in reliance upon its provisions. It is not probable that such a result was contemplated by the lawmaker. On the contrary, the act bears every evidence that it was intended to provide a security for laborers and material-men on which they could rely confidently for protection, unless they saw fit, by their own dealings with the contractor, to relinquish the benefit of the security. We are confirmed in these views by the following authorities: Dewey *vs.* State, 91 Ind., 173; Conn. *vs.* State, 125 Ind., 514; 25 N. E., 443; Doll *vs.* Crume, 41 Neb., 655; 59 N. W., 806; Kaufmann *vs.* Cooper, 46 Neb., 644; 65 N. W., 796; Steffes *vs.* Lemke, 40 Minn., 27; 41 N. W., 302. The first two of these cases are very much in point. Bonds were given to the State of Indiana as obligee for the doing of public work, in pursuance of a statute of that State, which bonds contained conditions requiring—first, the faithful performance and execution of the work undertaken by the contractor; and, second, the prompt payment by the contractor of all debts incurred by him in the prosecution of the work for

labor and materials supplied by third parties. It was held, in substance, that for any breach of the second condition of the bond by the contractor the right of action was in the laborer or the material-man, and that such right of action could not be defeated or prejudiced by any act done by the obligee in the bond after the bond had been taken and approved. It was accordingly ruled that changes made in the contract by the parties thereto, to wit, the contractor and the public authorities, after the bonds had been executed and accepted, would not deprive material-men of their right to recover against the sureties in the bond. It results from what has been said that the judgment of the circuit court was erroneous upon the facts found by that court, and should be reversed. It is so ordered, and that the case be remanded for a new trial."

In Guaranty Co. *vs.* United States, 191 U. S., 416, suit was brought to recover under a bond given under the act of 1894 above mentioned, and the questions involved were certified to this court. The court said:

"The question involved is whether the ordinary rule that exonerates the guarantor in case the time fixed for the performance of the contract by the principal be extended applies to a bond of this kind, executed by a guaranty company not only for a faithful performance of the original contract, but for the payment of the debts of the principal obligor to third parties. It is conceded that by the general law of suretyship, any change whatever in the contract for the performance of which the guarantor is liable, made without his consent, such, for instance, as an extension of time for payment, if made upon sufficient consideration, discharges the guarantor from liability. * * *

"Counsel for the brick company argued with much persuasiveness that this rule of *strictissimi juris*, though universally accepted as applicable to the undertaking of an ordinary guarantor, who is usually moved to lend his signature by motives of friendship or expectation of reciprocity, and without pecuniary

consideration, has no application to the guaranty companies, recently created, which undertake, upon the payment of a stipulated compensation, and as a strictly business enterprise, to indemnify or insure the obligee in the bond against any failure of the obligor to perform his contract. * * *

"We do not, however, deem it necessary to express an opinion upon this subject, as we prefer to rest our decision upon the peculiar character of the covenant upon which this action is brought. In an ordinary guaranty the guarantor understands perfectly the nature and extent of his obligation. * * *

"This covenant, however, is inserted for an entirely different purpose from that of securing to the Government the performance of the contract for the construction of the building. Inasmuch as neither the contractor nor his subcontractor can secure themselves by a mechanic's lien upon the proposed building, the Government, solely for the protection of the latter requires a covenant for the prompt payment of his claims, and the same security that it requires for the performance of the principal contract. In this covenant the surety guarantees nothing to the principal obligee,—the Government,—though the latter permits an action upon the bond for the benefit of the subcontractors. The covenant is made solely for their benefit. The guarantor is ignorant of the parties with whom his principal may contract, the amount, the nature, and the value of the materials required, as well as the time when payment for them will become due * * * and it is to be assumed that the surety contracts with knowledge of this fact. * * * If a person deliberately contracts for an uncertain liability he ought not to complain when that uncertainty becomes certain. * * *

"The rule of *strictissimi juris* is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal

obligor. Such a contract should be interpreted liberally in favor of the subcontractor, with a view of furthering the beneficient object of the statute. * * *

"Bonds containing the covenant in question are not common, though they have sometimes appeared in the State courts, and the construction here given them has been generally adopted (United States use of Snyder *vs.* Hazard, 53 App. Div., 410; 65 N. Y. Supp., 1051), although these cases have generally turned upon the question whether the rights of the material-men were affected by a change made in the contract by the principals. Dewey *vs.* State, 91 Ind., 173; Conn *vs.* State, 125 Ind., 514; 25 N. E., 443; Steffes *vs.* Lemke, 40 Minn., 27; 41 N. W., 302; Doll *vs.* Crume, 41 Neb., 655; 59 N. W., 806; Kaufman *vs.* Cooper, 46 Neb., 644; 65 N. W., 796; Griffith *vs.* Rundle, 23 Wash., 453; 55 L. R. A., 381; 63 Pac., 199."

In *U. S. vs. California Bridge & Construction Co.*, 152 Fed., 559, it was held that the bond is in effect two separate instruments, one furnishing protection to the United States and the other providing for the payment by the contractor of bills for labor and materials furnished, and that in the latter aspect the surety is not discharged from liability by a variation of the contract which might release it from liability to the United States, as by a change in the site of the building.

In *U. S. vs. Lynch*, 192 Fed., 364, decided in 1912, it was held that the surety on a bond given under the act of August 13, 1894, was not discharged from liability to a subcontractor for default of payment by the contractor for materials supplied by the subcontractor and used in the prosecution of the work by reason of a binding extension by the subcontractor, without the knowledge of the surety, of the time of payment, notwithstanding resulting loss to the surety. This case cites many Federal and State authorities to support the decision.

The Equitable Surety Company bases its position on the case of *United States vs. Freel,* 186 U. S., 309, which has no application to the question certified to this court, for the simple reason that that suit was founded upon "the usual penal bond" mentioned in the statute, not upon the "additional obligations" required by it, and, as shown in the case as reported in 92 Fed., was instituted two years before the act under consideration became law. It was to remedy evils existing in similar cases that the acts above mentioned were passed.

It is not here contended that the law has in any manner been changed as to the rule which would obtain had the District of Columbia changed the contract referred to without the consent of the surety and then undertaken to hold the surety liable; that proposition is not under consideration.

As shown by the certificate of the Court of Appeals (Rec., p. 2), other cases are pending in that court wherein the question here presented is involved. Counsel in those cases have asked us to file a copy of their additional brief which was filed in the Court of Appeals in answer to certain propositions raised during the hearing in that court. So much of said brief which is pertinent to the question here considered is filed as an appendix hereto, wherein are found other cases which would otherwise be cited in this brief.

It is respectfully submitted that the alteration of the terms of the contract set forth in the certificate herein by the District of Columbia and the contractor without the knowledge or consent of the surety did not have the effect to release the surety from the obligation of the bond.

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APPENDIX.

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IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1913.

ALLAN T. HOWISON AND EQUITABLE SURETY COMPANY, APPELLANTS,

vs.

UNITED STATES OF AMERICA TO THE USE OF C. F. THOMAS & SON BRICK COMPANY.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLEE.

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* * * * * * *

SECOND.

THE BOND IS A DUAL BOND, BEING FOR THE BENEFIT OF CERTAIN STATUTORY BENEFICIARIES, INCLUDING THE DISTRICT OF COLUMBIA AND THE MATERIAL-MEN AND LABORERS FURNISHING MATERIAL AND WORK ON THE BUILDING.

Permit us to reiterate that this bond is of a dual nature; that besides the usual and ordinary liability, which means obligation, on the part of the principal to protect the Dis-

trict of Columbia, there is the further additional liability to protect third persons from whom the contractor obtains material or labor. This additional obligation, provided for in the statute, was prescribed for the benefit of persons supplying labor or material, and the statute contains nothing to suggest that the claims of material-men or laborers under such bonds are secondary or subordinate to the claims or obligations of the District of Columbia, or, where the building is a public building of the United States, the claims of the United States.

There are two statutes creating what we might call statutory beneficiaries or adding to what was formerly merely a bond on the part of the contractor and surety to perform the services for the obligee. They are the act of Congress of August 13, 1894, and the act of Congress of February 28, 1899. These statutes are identical in their language, except in this: the act of February 28, 1899, extends the provisions of the act of August 13, 1894, to include contracts made with the District of Columbia, the only difference in the two acts being in the words, "entering into a formal contract with the United States," and the words, "entering into a formal contract with the District of Columbia." The object of these several acts is to afford a particular method of enforcing against contractors the claims of material-men and laborers who have furnished material or done work on property belonging to the United States or District of Columbia, such as public buildings, etc., it being remembered that neither the United States nor the District of Columbia can have enforced against it a lien under the general lien laws for labor and material. Therefore, when we have a contract for a public building, and a bond guaranteeing that contract, and default on the part of the principal, any one of the statutory beneficiaries has a right of action provided he alleges and can prove that the labor or material were supplied in the prosecution of the

work provided for in the contract, and that the contractor gave the bond required by the statute to make prompt payment to all persons doing such work or furnishing such material. The contract is the chart upon which recovery can be had. In other words, to determine whether a person who has performed labor or furnished material is entitled to recover, it must appear that the materials were supplied and the work done in the prosecution of the work provided for in the contract, and that the contractor and surety covenanted in the bond to make prompt payment as provided for in the statute. These acts really confer a special lien in favor of material-men and laborers and should be liberally construed so as to protect their interest.

United States to use of Standard Oil Co. *vs.* Security Co., 21 Apps., 369.

United States to use of Vermont Marble Company *vs.* Bergdorf, 13 Apps., 506.

In that case, in 13 Apps., 506, counsel representing appellants in this case represented appellees, and attempted to invoke the same doctrine of construction that is attempted to be invoked here, but the court in its opinion repudiated the contention of counsel and reversed the case.

Mr. Justice Shepard speaking for the court says:

> "Whether founded in a superior natural equity or not, the claim of those who furnished labor and materials in the construction of buildings for private owners have for very many years been regarded with special favor by legislatures.
>
> "The evils resulting from the failures, and sometimes frauds of contractors and owners were considered so serious and wide-reaching as to require remedy upon considerations of sound public policy; and statutes conferring special rights of lien upon the improved property were generally enacted by the States of the Union, and have been continued in

force, with a tendency rather towards the extension of their scope. Congress, long since, adopted the same general policy in its legislation for the District of Columbia.

"This idea of public policy, however, was not stretched to the extent of giving such liens, upon public buildings; other important considerations stood in the way. The evils, therefore, that were in part remedied through legislation in respect of private building contracts, remained in increased proportion with the enormous public works in which the United States are constantly engaged until the statute hereinabove recited was enacted with the intent to meet and mitigate them.

"The obligation of this statute falls directly upon the person to whom a contract shall have been awarded, as a condition precedent to his entry upon its performance. It commands him to execute a bond with sufficient sureties, conditioned, in addition to the faithful performance of his contract, that he shall promptly make payments to all persons supplying him labor and material in the prosecution of the work provided therein.

"The practical effect of the statute is to confer a special lien in favor of such persons and to substitute this bond, in the place of the public building, as the thing upon which that lien is charged.

"The bond is not, therefore, to be considered as if a special private offer of guaranty by the sureties to particular persons from whom their principal may solicit credit in the procurement of labor and materials, but as the performance of a precedent statutory condition of his contract, intended for the benefit of all persons whomsoever, that, relying upon the provisions of the statute, shall have supplied him labor and material in this performance.

"The bond sued on follows the general terms of the statute and is the execution of its purpose.

"The sureties are as much bound by its true intent and meaning as the principal who executed it with them, and their liability is to be determined by the

same general rule of construction. Fulton *vs.* Fletcher, 12 Apps. D. C., 1, 17; United States *vs.* Maloney, 4 Apps. D. C., 505, 511.

"We see no reason why the liability of the sureties in this case should not be governed by the same rule of construction that applies in the assertion of similar liens against the private owners of buildings under the ordinary lien laws, rather than by that which applies in the case of special private bonds, or letters of credit and of commercial guaranty, wherein especially by the older authorities, sureties have been regarded with especial favor by the court, and, in consequence, have had the obligations of such contracts interpreted with the greatest strictness. Nor is there any just reason why greater consideration should be given to the sureties in such bonds than to the private owners of property, who are in no better condition to protect themselves against the defaults of contractors.

"As a general rule, statutes providing for liens in favor of those furnishing labor and materials used in the construction of buildings have been liberally construed in aid of the suppression of the mischief and the advancement of the remedy. Mining Company *vs.* Cullins, 104 U. S., 176, 177."

In the case at bar plaintiff brings himself within these authorities and this is not contradicted by the affidavit. The only statement in the affidavit of defense is that after the making of the contract under which the material was furnished by the plaintiff, and after the giving of the bond which was to secure said contract, one of the statutory beneficiaries, the District of Columbia, entered into an agreement by which the building, instead of fronting on Eleventh street northwest, was made to front on Harvard street northwest. There is no allegation that this was done with the knowledge of the plaintiff, nor, indeed, would the knowledge of the plaintiff have any effect on his right to recover, for under the authorities, and under the decisions of this

court, if he furnished material in the prosecution of the work provided for in the contract, and back of the contract there was this statutory bond, the plaintiff is entitled to recover. The suggestion that the materials were furnished under a new contract is not well taken, for the defendant admits that the materials were furnished under the contract for which the bond was given, but claims that the alteration of the contract by the principal and the District of Columbia, one of the statutory beneficiaries, discharges the contract altogether. That a principal on a bond and one of the beneficiaries can discharge the surety as to the other beneficiaries is a doctrine unheard of, unless, of course, there be some joint right in all which can be discharged by the action of but one joint owner.

In this bond here under consideration, by all of the authorities, the liability of the principal to the District of Columbia, one of the statutory beneficiaries, and to the material-men and laborers, the other statutory beneficiaries, is several and not joint. The District of Columbia and the laborers and material-men each have a separate and distinct right of action, and neither the District of Columbia, the laborers nor the material-men can do any act which would in any way affect the several rights of the other. This proposition is elemental.

Take the illustration suggested at the argument of this case. "A" is the executor of an estate, "B" is the surety. "A" defaults. There are legacies payable to "X," "Y" and "Z." "A" secures a release of all liability on the bond from "X." This can in no way affect the rights of action of "Y" and "Z." They all have a separate right on the bond in the name of the United States to recover what is due them as legatees.

Take this illustration. The District of Columbia, A, B and C are the statutory obligees in this bond. The District

of Columbia releases the surety from liability under the bond, by a release signed, sealed and delivered by the District of Columbia. This in no way affects the rights of A, B and C. Or suppose A, B and C releases the surety, this can in no way affect the rights of the District of Columbia. Neither has any power to affect the rights of the other. Their rights are separate and distinct, and no act on the part of any one of them can release or destroy the rights of any one of the others. If the District of Columbia cannot destroy the rights of material-men or laborers by expressly releasing the surety, how can the District of Columbia destroy the rights of material-men and laborers by entering into an agreement with the surety which changes some part of the contract. In the first illustration given the destruction of the contract would be express, if the District of Columbia had power to destroy it; in the second instance, it would be implied, if the District of Columbia had power to destroy it. If the District of Columbia cannot expressly destroy this contract, how can it impliedly destroy it; if it cannot by an express agreement with Howison destroy the rights of material-men and laborers under the contract, who furnish material and labor by virtue of the contract, how can it by an act which impliedly works a revocation between the District of Columbia and the surety, destroy the rights of these material-men? It is respectfully submitted that it cannot be done, and that all authority holds that it cannot be done, and that wherever a person furnishes labor or material called for in the original contract, they shall have a right to recover, notwithstanding the fact that the principal and the District of Columbia have made some other changes in the contract, that such persons come within the original contract, that the bond guarantees the contract, and they are therefore entitled to recover.

THIRD.

The Surety is Fully Protected Even Though the Claims of the Several Statutory Beneficiaries Exceed the Penalty of the Bond.

It was suggested that, carrying this contention to its logical conclusion, the surety might become liable for more than the penalty of the bond, but that is the measure of the surety's liability, and if the breaches of the bond created more damage than the penalty of the bond, then the equitable rule of pro rata distribution arises, and would exist between the District of Columbia and the material-man and laborers, as well as between the material-men and laborers, if there was no breach as to the District of Columbia.

This principle of law is decided in the case of the American Surety Company *vs.* Lawrenceville Cement Co., 96 Federal Reporter, 75, where the court says:

> "The equitable rule of pro rata distribution exists not only between the United States and individual claimants, but also as between individual claimants themselves."

The contention was further made in that case that the United States should have priority, but the court said:

> "The United States, by the force of the statute, voluntarily make themselves trustee, alike for their own interest and for the interest of the individuals intended to be protected, and having thus voluntarily created and accepted a trust, they are barred by equitable principles from asserting for themselves any advantage over other beneficiaries."

Again, speaking of this additional obligation, Judge Dallas, Circuit Judge, in the case of United States *vs.* Heaton, 128 Federal Reporter, 416, speaking for the Circuit Court of Appeals for the Third Circuit, says:

> "That this additional obligation was prescribed for the benefit of persons supplying labor and material appears from the title of the act, and also from its provisions authorizing them to sue for their own use, and it contains nothing to suggest that it was intended that their claims under such bonds were to be secondary or subordinate to those of the Government."

In this case an action was brought by the United States against Edward Heaton and the American Bonding & Trust Co., of Baltimore, Md., upon a bond in the penal sum of $8,000. The United States brought suit for what it cost them to finish the work under the contract, but before any plea was filed by the defendants, the bonding company filed a petition setting forth, among other things, that several persons and firms named in the petition had made demand upon the petitioner for payment by it of their respective claims for material, the demand being by persons supplying labor and material as aforesaid, and that they threatened to sue the surety, that the surety could not pay all the claims, including the claim of the United States, without paying a sum largely in excess of its liability. It offered to pay the penal sum of the bond into court, and prayed the court to cause distribution of the same to be made among the plaintiff and other rightful claimants thereto. Upon consideration of this petition, the court made the order, and the cause was referred to an auditor to hear all of the claimants and determine the amount of the respective claims and what proportion of the penal sum each was entitled to receive. After hearing the claimants, a *pro rata* distribution was made, and

an allowance of $200 counsel fees to the surety company, the court held the allowance of counsel fees erroneous, and confined the distribution of the penal sum of the bond among the claimants.

In fact, our Code, in sections 1529, 1530 and 1531, provides for just such proceeding as would occur in this case if the statutory beneficiaries' claims amounted to more than the penal sum of the bond. Upon suit by one of the statutory beneficiaries, either the District of Columbia or any other one, the defendant could file a petition, paying the amount of the penalty of the bond into court, stating who else claimed under the bond, and the whole matter would be heard and determined in the same manner as the Heaton case.

Several cases have arisen where the United States, or the person whom we might style the principal obligee, has been compelled to finish the work at a loss and have claimed that this amount should be deducted from the penal bond. The courts have disallowed any such claim.

In the case of Griffith *vs.* Rundle, in 23 Washington, 458, the court say:

> "It is pertinent to suggest that in the performance of the unfinished contract by the sureties, if they had expended less than the amount to be paid by the Government on the completion of the contract, the excess of profit would have belonged to them, and if they undertook the completion of the contract, and sustained a loss, it would seem that it should fall upon them. As sureties under the terms of the contract, they might elect to complete it upon default of their principal, but such completion was not the full performance of the contract by the principal himself. It satisfies the surety's contract with the Government, but as observed by the Circuit Court of Appeals in United States *vs.* Rundle, 100 Federal Reporter, 400,

the United States is not a claimant here, and the question of priority of claims to the amount due from the sureties under the terms of the bond is not involved in this case."

In the United States *vs.* Rundle *et al.*, 100 Federal Reporter, 402, the Circuit Court of Appeals refused to permit the surety company to offset against its bond the cost of completion of the building, over and above the contract price. The court said:

"The effect of the instruction stated was to tell the jury that if the proper completion of the contract by the sureties cost them $10,000 or more over and above the contract price, then in that event their liability upon the bond was exhausted and the plaintiff could not recover. In this there was error. The liability created by the bond was in no respect affected by what it cost to complete the work in accordance with the contract, whether completed by the contractor himself or his surety. Full performance of its terms and conditions was what the contract called for, and to secure which the bond was exacted and executed. The United States, having received such full performance, received all that it was entitled to, and therefore had no cause of action upon the bond, but it received nothing more than it was entitled to, however much it may have cost the contractor or his sureties to completely perform the contract. The bond was, however, as was said by the Circuit Court of Appeals in the Eighth Circuit, in the United States *vs.* National Surety Company, 92 Federal Reporter, 549, intended to perform a double function,—in the first place, to secure to the Government as before the faithful performance of all obligations which a contractor might assume towards it; and in the second place, to protect third persons from whom the contractor obtained materials or labor. Viewed in the latter aspect, the bond, by virtue of the operation of the statute, con-

> tains an agreement between the obligors therein and such third persons that they shall be paid for whatever labor or material they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains, the one for the benefit of the Government, and the one for the benefit of third persons—are as distinct as if they were contained in separate instruments, the Government's name being used as obligee in the latter agreement merely as a matter of convenience."

Again, in American Surety Company *vs.* Lawrenceville Cement Company, 110 Federal Reporter, the damages exceeded the amount of the penalty and were prorated, each claimant receiving his *pro rata* share.

It is respectfully submitted that these authorities fully answer the question as to the extent of the liability of the surety to the several statutory beneficiaries under the bond.

FOURTH.

No Change Made by the Principal on the Bond and the District of Columbia, One of the Statutory Beneficiaries, Can Affect the Rights of Laborers and Material-men.

We come now to consider briefly the effect of the arrangement between the District of Columbia, one of the statutory beneficiaries, and the principal under the bond.

In the case in 92 Federal Reporter, 550, which is referred to in the first brief, the Circuit Court of Appeals, speaking through Thayer, circuit judge, said:

> "It is a familiar rule of law that a contract of a surety must be strictly construed and that it cannot be enlarged by construction, and that when a bond with sureties has been given to secure the performance of a contract, and the principal in the bond and the per-

son for whose benefit it was given make a material change in the contract without the consent of the surety, the latter is thereby discharged. For present purposes it may be conceded that the finding of the lower court in the case at bar *discloses such a modification of the original contract between Prosser and the United States as would fall within the rule last stated and release the defendant company from its liability, if the United States was suing for its own benefit for a breach of some provision of the contract, the due performance for which the bond was intended to secure.* Such, however, is not the case. The suit is not brought by the United States to recover any damage which it has sustained, neither is it brought to enforce any provision of the contract which was entered into between the United States and the principal in the bond. On the contrary, the action is one to enforce a stipulation found in the bond and only in the bond, which was intended *solely* for the protection of laborers and material-men who might furnish labor and material while the contract was being executed by Prosser."

To the same effect is the case of Griffith *vs.* Rundle, 23 Washington, 455. In that case the court say:

"The several assignments of error made by the appellants may be grouped together and stated as the refusal of the Superior Court to admit testimony under the affirmative defense set up in the answer. The court excluded any evidence with reference to the United States having demanded of the surety the performance of the contract or the payment of damages. It is maintained by counsel for appellants that the limit of liability of the surety was the penalty stated in the bond, $10,000, and that if the surety had not undertaken the performance of the contract for their principal, the entire damages to both the Government and the respondents and all others of the claimants for labor and material would have been

liquidated by the payment of $10,000. The fact that the surety has necessarily expended more than that sum in the completion of the contract, and over the contract price, relieved them from further liability. It is also maintained that if the contract had not been completed, the Government is a preferred creditor and its claim would exhaust the penalty and there would be no funds for the satisfaction of plaintiffs and other claimants of like character, and counsel maintain that is necessary to determine the question of priority of rights as between the Government and these claimants. In a case involving these facts, United States *vs.* Rundle, in the State circuit court, judgment was entered in conformity with the contention of counsel here, but the cause was afterwards reversed by the United States Circuit Court of Appeals, 100 Federal, 400, and the court observed:

"'The undisputed facts of the present case are such that it is not necessary to consider the question presented in the court below and argued here, whether, if the United States had any cause of action on the bond in suit, its claims should be preferred to that of the laborers and material-men, for as has already been observed, the United States received full performance of the contract and therefore has no complaint. In the case of United States *vs.* National Surety Company, 92 Federal Reporter, 549, such a bond was under consideration by the court, and it was there adjudged that the bond was intended to perform a double function: first, to secure the faithful performance of the contract to the Government; and, second, to protect third persons from whom the contractor might obtain labor and material in the prosecution of the work. In its second aspect, the bond, by virtue of the statute, contains a separate and distinct agreement between the obligors and such third persons as to which agency of the Government ceases when the bond is given and approved, *and subsequent*

changes in the contract agreed upon between the Government and the contractor, though without the knowledge or consent of the surety, will not release the surety from liability to persons who supply labor or material thereunder.'"

In the same case the court say:

> "In the case of Dewey *vs.* State *ex rel.* McCollum, 91 Ind., 173, it was substantially held that for any breach of a second condition of such a bond by the contractor, the right of action was for the benefit of a laborer or material-man, and that such right of action could not be defeated or abridged by any act done by the obligee in the bond after the bond had been taken and approved, and it was ruled that changes made by the parties thereto—that is, the contractor and the public authorities—after the bond had been accepted, would not deprive material-men of their right to recover against the sureties in the bond."

To the same effect is Conn *vs.* State *ex rel.* Stutsman, 125 Ind., 514, and the same principle is affirmed in Doll *vs.* Crume, 41 Neb., 655; Steffes *vs.* Lemke, 40 Minn., 27.

The probable effect of the statute and others of similar character in a number of the States seems to be to confer a special lien in favor of such persons who furnish such labor and material, and to substitute the bond in the place of the public building as the thing upon which the lien is to be had. Such liens evidently appear from an inspection of the current legislation to be favored, and the courts have usually adopted a liberal rule of construction in their enforcement.

Again, in the case of Henricus *et al. vs.* Englert, 137 N. Y., 494, the court say:

> "It is quite true that there were some changes in the plans and specifications for the erection of this building after the execution of the bond, but those changes, whatever their character, were made without the direction, consent or procurement of the plaintiffs, and it does not appear that they had anything whatever to do with the making of them. *They were not even bound to protest against, or object to them.* They were made by Vogle and the architect who was employed by the village to superintend the erection of the building, and some of them may have been consented to by the trustees of the village. Changes thus made in the contract of the principal cannot affect the obligation of the defendant to these plaintiffs."

In Doll *et al. vs.* Crume, 41 Neb., 660, the change in the contract was a change as to payments, and the court held that such changes did not affect the rights of the material-men to recover on the bond; that while the bond between the principal and the principal obligee might be annulled, it remained in effect as to material men and laborers. The court, in substance, said that the contract between the State and Davis and his sureties, and the promises and liabilities of the latter thereunder, were of a dual nature, a promise to the State that Davis should perform the work in the time when he had agreed and the promise, in effect, to Crume to pay him for the labor he should perform for Davis; that the State's overpaying Davis and extending the time for the performance of his contract did not release the sureties from their contract to pay Davis' laborers, and that if the State had precluded itself from calling on the sureties to make good to it in the default of Davis its acts did not estop the laborers of Davis from enforcing against the sureties their contracts and promises.

In the case of School District *ex rel. vs.* Livers, 147 Mo., 585, the Supreme Court of that State, referring to the last-mentioned case, say:

"Paraphrasing what is said in that case, the case stands just as if Livers and Pullman and their sureties had made the written promise directly to the Koken Iron Works instead of the School District. Then how can it be said that no act of the School District in overpaying Livers and Pullman can release them or their sureties from their contract with the Koken Iron Works? It may be that the School District by its actions has precluded itself from recovering from the sureties on the contract for any default of theirs in their promise, but it by no means follows that the School District's action estops the Koken Iron Works. In other words, there were two contracts, with one consideration to support both. To the same effect is Lyman *vs.* Lincoln, 38 Neb., 794."

Again, in Steffes *vs.* Lemke, 40 Minn., 29, the court, referring to a bond of the character of the bond here, said:

"Such a bond being executed and filed, the principal obligor and the nominal obligee cannot, either by agreement or act, affect the right or interest of the parties really interested in and secured by it, to wit: those doing work on or furnishing material for the building. Without the consent of those parties they cannot discharge it or impair its obligation. It is true such work must be done and materials furnished pursuant to—that is, in fulfillment of—the contract between the owner and contractor."

In the case of Abbott *vs.* Morrissette *et al.*, 46 Minn., 11, the principals on the bond and the principal obligee agreed to release one of the principals, and it was contended that this destroyed the bond, and that material-men and laborers were not entitled to recover. The court said:

"This defense cannot be sustained. The obligation of the principal obligors and of the sureties is not

> limited to debts contracted by such principal obligors or original contractors. The bond is executed under and in pursuance of the statute, and is intended to have a wide scope and effect. It is to be read in connection with the statute. It takes the place of and becomes a substitute for the statutory lien to which laborers and material-men are entitled in the absence of such bond. The statute provides that upon the execution and approval of such bond no lien shall attach to the property. * * * If the limited effect for which the appellants contend were given to the bond—if the withdrawal of one of the several contractors or an assignment by one of them or all of them is effectual to discharge the sureties as to material or labor afterwards supplied in the performance of the original contract—the result would be that either that such bond affords very uncertain security to the land-owners as against material-men or laborers, or else that the latter class do not enjoy the protection which the statute professes to give them."

To the same effect is Kauffman *vs.* Cooper *et al.,* in the Supreme Court of Nebraska, and reported in 65 Northwestern, at page 796.

In the case of United States *vs.* California Bridge Construction Company, 152 Federal, 559, referred to in other brief, the court, referring to the bond in that case, said:

> "It is the usual penal bond with good and sufficient sureties, that is given to the United States, but to this undertaking is added the additional obligation that such contractor or contractors shall promptly make payment to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract. This is an agreement as distinct as if it were contained in a separate instrument, and it is this agreement which the bridge co. violated and the surety company is now asked to make good. That the Phœnix Iron Company did supply the contractor with material for the prosecution of the work

provided for in the contract cannot be denied. These materials were shipped to and received by the contractor and were inspected and accepted by the Government. They were also paid for by the Government, and were afterwards used in the building that was erected upon the second site by another contractor. In my opinion, these facts establish beyond question the surety's liability. It is perhaps a doubtful question whether the change of site was a variation of the agreement. The bridge company's undertaking was to do certain work at the United States Navy Yard, Mare Island, California, no particular site being pointed out in the contract or in the specifications, and both sites being in the descriptive words just quoted. But assuming that the change of site varied the agreement so that the Government thereby lost the protection of the surety's obligation, it does not follow that the protection of the separate and additional obligation was also lost so far as the Phœnix Iron Company is concerned. This additional obligation has not been varied in any respect with the consent or acquiescence of the iron company. *This company has fulfilled its subcontract to furnish material for the prosecution of the work, and in my opinion the surety has not even a technical defense to the claim.* The point has been squarely decided by the Circuit Court of Appeals for the Eighth Circuit, in United States to the use of, etc., *vs.* National Surety Company, 92 Federal Reporter, 549, and I refer to the opinion of the court delivered by Judge Thayer as a thoroughly satisfactory discussion of the question now under consideration."

From this wealth of authority, it is respectfully submitted that any other decision by this court than an affirmance of the judgment below would lay down a new rule of law unsupported by precedent, reason or justice.

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